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04 UNITED STATES DISTRICT COURT  
05 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

06 LEIGH FOXLEY, ) CASE NO. C06-0114-RSL  
07 Plaintiff, )  
08 v. ) REPORT AND RECOMMENDATION  
09 TIM CRISTMAN, et al., )  
10 Defendants. )  
11 \_\_\_\_\_ )

12 INTRODUCTION AND SUMMARY CONCLUSION

13 Plaintiff Leigh Foxley is a Washington State prisoner who is currently incarcerated at the  
14 Monroe Corrections Complex, Twin Rivers Unit (MCC-TRU). He brings this action under 42  
15 U.S.C. § 1983 to allege that the named defendants have denied him adequate medical care for his  
16 inguinal hernia in violation of his rights under the Eighth Amendment to the United States  
17 Constitution. Plaintiff also alleges in his complaint that defendants committed medical malpractice  
18 when they denied surgical repair of his hernia. Plaintiff identifies as defendants in this action Tim  
19 Cristman, a physician's assistant who was plaintiff's assigned medical provider at MCC-TRU, and  
20 J. David Kenney, M.D., Medical Director at MCC-TRU. Plaintiff seeks damages and an order  
21 directing that defendants have plaintiff's inguinal hernia surgically repaired.

22 The parties have now filed motions for summary judgment. This Court, having reviewed

01 the parties' summary judgment motions, and the balance of the record, concludes that defendants'  
02 motion for summary judgment should be granted, plaintiff's motion for summary judgment should  
03 be denied, and this action should be dismissed with prejudice as to petitioner's federal  
04 constitutional claim and without prejudice as to plaintiff's medical malpractice claim.

05 FACTS

06 On April 15, 2005, plaintiff injured himself while installing a gate that he had fabricated as  
07 a part of his job at MCC-TRU. (Dkt. No. 5 at 3; Dkt. No. 15-2 at 7.) According to plaintiff, his  
08 leg slipped as he and four other individuals were carrying the gate, and he felt a groin pull. (Dkt.  
09 No. 15-2 at 7.) That injury appeared to resolve itself within a couple of days and plaintiff felt  
10 better until early May when he was again injured at work while lifting large trash dumpsters. (*Id.*  
11 at 8.) Sometime following this second incident at work, plaintiff signed up to see his TRU medical  
12 provider. (*Id.* at 9.) Plaintiff was given an appointment for May 23, 2005. (*Id.*)

13 Plaintiff was seen by his medical provider, Physicians Assistant Tim Cristman, at his May  
14 23, appointment.<sup>1</sup> (Dkt. No. 15-2 at 42.) Defendant Cristman concluded that plaintiff had an  
15 inguinal hernia. (*Id.*) However, defendant Cristman's examination showed no incarceration of  
16 the hernia and plaintiff complained of only an uncomfortable feeling. (*Id.*) Defendant Cristman  
17 therefore ordered a truss for plaintiff to help stabilize the abdomen and prevent bulges from  
18 occurring. (*Id.*) He also issued a Health Status Report ("HSR") requiring that plaintiff be

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20 <sup>1</sup> Plaintiff asserts that when he first went in for his appointment on May 23, he was seen  
21 by an intern who asked plaintiff a series of questions, examined him, and told him he had a hernia.  
22 (Dkt. No. 15-2 at 11.) According to plaintiff, the intern told him that he was a candidate to get  
the hernia repaired and that he would talk to plaintiff's provider about it. (*Id.*) The intern  
subsequently reported back to plaintiff that the hernia would not be surgically repaired pursuant  
to Department of Corrections policy. (*Id.*)

01 provided a lower bunk and that his activities be limited to preclude heavy lifting, running, and  
02 vigorous exercise. (*Id.* at 42, 47.) Finally, defendant Cristman gave plaintiff a prescription for  
03 Tylenol. (Dkt. No. 15-2 at 45.) Defendant Cristman's notes from that appointment indicate that  
04 plaintiff was not happy with the treatment plan and that he wanted a surgical consult. (*Id.*)

05 On May 25, 2005, defendant Cristman prepared a Consultation Request Report requesting  
06 that plaintiff's case be presented to the Care Review Committee (CRC)<sup>2</sup>. (*See id.* at 42 and 49.)  
07 On the same date, plaintiff directed a letter to Superintendent Spaulding in which he asserted that  
08 he had been denied proper medical care and he requested that Superintendent Spaulding authorize  
09 surgery. (Dkt. No. 16 at 9.) On June 14, 2005, defendant Kenney responded to the letter plaintiff  
10 sent to Superintendent Spaulding. (Dkt. No. 16 at 10.) In his response to plaintiff, defendant  
11 Kenney explained that treatments such as hernia repair needed to be discussed on a case by case  
12 basis and advised that plaintiff's case would be presented to the CRC for consideration. ( *Id.*)  
13 Defendant Kenney also indicated in his response that the care advised by plaintiff's provider was  
14 reasonable and that plaintiff should inform his provider if his condition changed. (*Id.*)

15 On June 22, 2005, defendant Cristman saw plaintiff for re-evaluation of his hernia. (Dkt.  
16 No. 15-2 at 43 and 51.) The appointment took place just prior to presentation of plaintiff's case  
17 to the CRC. (Dkt. No. 15-2 at 43.) Defendant Cristman's progress notes from that appointment  
18 reflect that the hernia could be easily reduced, that it was 2-3cm in size, and that plaintiff neither  
19 reported any intractable pain nor apparently exhibited any pain when defendant palpated the  
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21 <sup>2</sup> The CRC is comprised of Department of Corrections primary care providers, including  
22 physicians, physician's assistants (PAs), and registered nurse practitioners (ARNPs), who review  
the medical necessity of certain proposed care.

01 region. (*Id.* at 51.) This was the last time plaintiff was examined by defendant Cristman.

02       Following plaintiff's appointment on June 22, 2005, defendant Cristman presented  
03 plaintiff's case to the CRC for approval of the requested surgical repair. (*Id.*) Defendant Cristman  
04 states that he actively advocated for plaintiff's desire for surgery, but the CRC denied the request.  
05 (*Id.*) He also states that while he advocated for plaintiff, he nonetheless agreed with the decision  
06 of the CRC. (*Id.*)

07       The truss which was prescribed by defendant Cristman on May 23, 2005, was finally  
08 received by plaintiff on approximately June 29, 2005. (*See* Dkt. No. 15-2 at 14.) That first truss  
09 ripped after only two months, and plaintiff signed up to receive another one. ( *Id.* at 15.) On  
10 August 31, 2005, plaintiff was seen, apparently by an ARNP, to discuss his hernia. Dkt. No. 15-3  
11 at 44.) At that time, plaintiff reported that the hernia was painful when he was standing, but felt  
12 fine when he laid down and the hernia reduced. (*Id.*) Plaintiff also reported that his hernia belt  
13 was ripping and that even though he was wearing it 12 hours a day, the hernia would still come  
14 out of the belt and would then be "pinched." (*Id.*) He indicated that his pain was five on a scale  
15 of one to ten. (*Id.*) Plaintiff further indicated that he had grieved the CRC's ruling denying him  
16 surgery. ( *Id.*) The provider observed that plaintiff was sitting comfortably during the  
17 appointment, that the inguinal mass was approximately 4-6 cm<sup>3</sup>, that it was reducible, and that  
18 there was no obvious strangulation. (*Id.*) The provider issued a new hernia belt and apparently  
19 recommended that plaintiff's case be sent to the CRC for re-evaluation. (*Id.*) It is not clear  
20 whether this re-evaluation ever took place.

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22       <sup>3</sup> There is some question in the record regarding the accuracy of this measurement. (*See*  
dkt. No. 15-2 at 20.)

01 Plaintiff was next seen on October 17, 2005. (Dkt. No. 15-3 at 46.) The primary  
02 encounter report appears to indicate that plaintiff reported to the provider at that time that his  
03 hernia was unchanged since his August 31, 2005, appointment, that he still had occasional  
04 abdominal pain, and that he had received his new truss. (*Id.*) The report further indicates that  
05 plaintiff declined to be examined. (*Id.*) The provider noted that the hernia was “stable chronic.”  
06 (*Id.*)

07 Plaintiff was not seen again until March 17, 2006. (*Id.*) The primary encounter report for  
08 that appointment reflects that plaintiff estimated the size of his hernia at about 1.5 cm. (*Id.*)  
09 Plaintiff reported that it would come out with prolonged standing, and that it would feel crampy  
10 and painful when it came out. (*Id.*) Plaintiff also reported that he had gained 35 pounds due to  
11 his inactivity, and that walking caused the hernia to come out even if the hernia belt was in place.  
12 (*Id.*) Plaintiff indicated that he wore the belt at work where he was able to do welding projects  
13 while seated at a table, and that the hernia did not come out while he was sitting. (Dkt. No. 15-3  
14 at 46.)

15 Upon examination, the provider observed a small bulge, approximately 1.5 cm, but noted  
16 that it reduced easily and that the tenderness resolved with reduction. (*Id.*) At that appointment,  
17 the provider explained to plaintiff the criteria for surgery under the DOC plan, including intractable  
18 pain and non-reducibility. (*Id.* at 47.) She also explained the need to continue monitoring the  
19 hernia and to contact medical staff immediately if the hernia would not reduce. (*Id.*)

20 Plaintiff was seen on April 12, 2006, for renewal of his HSRs for a lower bunk and a hernia  
21 belt. (*Id.* at 47, 49.) Plaintiff was seen again on August 24, 2006. (*Id.* at 51.) The purpose of  
22 this appointment was apparently to renew a prescription unrelated to the hernia. (*Id.*) The

01 primary encounter report for the appointment indicates, however, that the hernia was  
02 “unchanged.” (*Id.* at 51.)

03 Plaintiff filed the instant action in January 2006. Defendants filed their summary motion  
04 on August 31, 2006. Plaintiff filed his summary judgment motion on the same date. Those  
05 motions are now ripe for review.

#### 06 Summary Judgment

07 Summary judgment is appropriate when, viewing the evidence in the light most favorable  
08 to the nonmoving party, there exists “no genuine issue as to any material fact” such that “the  
09 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A material fact  
10 is a fact relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477  
11 U.S. 242, 248 (1986). Genuine issues of material fact are those for which the evidence is such that  
12 “a reasonable jury could return a verdict for the nonmoving party.” *Id.*

13 In response to a properly supported summary judgment motion, the nonmoving party may  
14 not rest upon mere allegations or denials in the pleadings, but must set forth specific facts  
15 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the  
16 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of  
17 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252.

#### 18 Eighth Amendment Claim

19 Plaintiff alleges in his § 1983 civil rights complaint that defendants are violating his rights  
20 under the Eighth Amendment by denying him surgery necessary to repair his inguinal hernia.  
21 Section 1983 requires a claimant to prove (1) that a person acting under color of state law (2)  
22 committed an act that deprived the claimant of some right, privilege, or immunity protected by the

01 Constitution or laws of the United States. *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988).  
02 There is no dispute here that the defendants acted under color of state law. The sole issue is  
03 whether the defendants' conduct deprived plaintiff of a federally protected right.

04 The Eighth Amendment imposes a duty upon prison officials to provide humane conditions  
05 of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes ensuring that  
06 inmates receive adequate medical care. *Id.* In order to establish an Eighth Amendment violation,  
07 a prisoner must satisfy a two-part test containing both an objective and a subjective component.  
08 The Eighth Amendment standard requires proof that (1) the alleged wrongdoing was objectively  
09 "harmful enough" to establish a constitutional violation; and (2) the prison official acted with a  
10 sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. at 834. The objective  
11 component of an Eighth Amendment claim is "contextual and responsive to 'contemporary  
12 standards of decency'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)(quoting *Estelle v. Gamble*,  
13 429 U.S. 97, 103 (1976)). The state of mind requirement under the subjective component of the  
14 Eighth Amendment standard has been defined as "deliberate indifference" to an inmate's health or  
15 safety. *Farmer v. Brennan*, 511 U.S. at 834.

16 Plaintiff argues in his summary judgment motion that his hernia requires surgical repair,  
17 that the standard of care for his condition is, in fact, surgical repair, that there are no risk factors  
18 present which would militate against surgical repair, and that the decision to deny him surgery is  
19 based solely on Department of Corrections ("DOC") policy. Plaintiff appears to argue that this  
20 reliance on policy over the needs of the individual constitutes deliberate indifference. Plaintiff  
21 offers in support of his summary judgment motion his own affidavit, the affidavit of a fellow  
22 prisoner, Robert Miller, and a number of exhibits including articles apparently obtained from

01 various internet sites which describe the treatment generally provided for inguinal hernias.

02 Defendants argue in their summary judgment motion that they have not acted with  
03 deliberate indifference in failing to operate on plaintiff's hernia and that plaintiff, at best,  
04 establishes only a difference in medical opinion which does not rise to the level of a constitutional  
05 violation. Defendants offer in support of their motion the declarations of both defendants, and a  
06 number of exhibits including a partial transcripts of plaintiff's deposition, plaintiff's response to  
07 defendants' first set of interrogatories and requests for production, copies of plaintiff MCC-TRU  
08 medical records, and copies of the DOC Offender Health Plan.

09 This Court, having reviewed all of the materials presented by the parties, concludes that  
10 the record does not establish that defendants have been deliberately indifferent to plaintiff's  
11 medical needs. Defendant Cristman diagnosed plaintiff's condition, provided care for that  
12 condition in the form of a hernia belt, a Health Status Report which ensured plaintiff a lower bunk  
13 and limited plaintiff's activities, and a prescription for Tylenol. Defendant Cristman also  
14 advocated for plaintiff's request for surgery before the CRC. Defendant Cristman has had no  
15 involvement in plaintiff's care since the date he presented plaintiff's case to the CRC. Moreover,  
16 defendant Cristman states that he did not have any authority to authorize the surgery requested  
17 by plaintiff. Plaintiff offers no evidence to the contrary. Plaintiff fails to make clear what else  
18 defendant Cristman might have done to address his medical concerns related to his hernia.

19 Defendant Kenney is the medical director at MCC, and was a member of the CRC which  
20 denied plaintiff surgery. Defendant Kenney has apparently never had any direct involvement in  
21 plaintiff's care. Aside from defendant Kenney's role as a member of the CRC, his only direct  
22 involvement with plaintiff appears to have been responding to plaintiff's June 14, 2005, letter to



01 Superintendent Spaulding regarding the treatment recommended by defendant Cristman.

02 Defendant Kenney, in his declaration, describes generally how treatment decisions are  
03 made within the DOC. He also describes how the decision was made in plaintiff's individual case.  
04 Defendant Kenney explains that offender care at all DOC institutions is governed by the Offender  
05 Health Plan (OHP). The OHP describes three levels of care: medically necessary (Level I),  
06 medically necessary under certain circumstances (Level II), and not medically necessary (Level  
07 III). In order for surgery on an inguinal hernia to be deemed medically necessary, one of three  
08 conditions must be met: (1) the patient has intractable pain despite discontinuing all non-Activities  
09 of Daily Living<sup>4</sup>; (2) the hernia is incarcerated; or, (3) there is rapid growth of the hiatus.

10 Defendant Kenney states that the DOC does not have a blanket policy of denying requests  
11 for hernia operations. Rather, requests for hernia operations which do not meet the criteria for  
12 the care to be deemed medically necessary are initially deemed Level II requests and are  
13 considered by the CRC on a case-by-case-basis. The CRC reviewed plaintiff's request for surgery  
14 in light of the established criteria and voted to classify plaintiff's request as a Level III request; i.e.,  
15 medically unnecessary.

16 Defendant Kenney states that in his professional opinion, the decision to deny plaintiff  
17 surgery, and to adopt an "expectant observation" approach to plaintiff's condition was medically  
18 appropriate. He notes that plaintiff's condition does not currently interfere with his activities of  
19 daily living or compromise his ability to live within the institution. He further notes that the denial  
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21 <sup>4</sup>The OHP defines Activities of Daily Living or ADLs, as activities related to personal care  
22 which include bathing or showering, dressing, getting in or out of bed or a chair, using the toilet,  
and eating. (*See* Dkt. No. 15-3 at 20.)

01 of surgery at this time does not cause plaintiff any harm nor does it compromise future care.  
02 Plaintiff offers nothing to refute defendant Kenney's opinion that the care he is receiving for his  
03 hernia is appropriate under the circumstances.

04 As noted above, plaintiff has provided the Court with printouts from internet sites which  
05 describe generally the treatment for an inguinal hernia, but those printouts do not bear the weight  
06 plaintiff assigns them. Plaintiff asserts that these printouts support his assertion that surgical repair  
07 is the standard of care for his condition. In fact, the WebMD article submitted by plaintiff states  
08 as follows:

09 Not all hernias need to be treated. However, most hernias that cause symptoms or  
10 become larger should be repaired by a surgeon. While awaiting surgery, some people  
11 wear a device called a truss, which puts pressure on the hernia and keeps it under  
12 control. In people who are poor candidates for surgery because of poor health or  
13 advanced age, a truss may be used permanently.  
(Dkt. No. 16 at 28.)

13 The Mayoclinic.com article provided by plaintiff states "If your hernia is small and isn't  
14 bothering you, your doctor may recommend a watch-and-wait approach. But growing or painful  
15 hernias usually require surgical repair to relieve discomfort and prevent serious complications."  
16 (*Id.* at 30.) The Cornell University article provided by plaintiff suggests that surgery may be  
17 required if the hernia resists "all external repositioning efforts" or if it is large and cannot be  
18 pushed back into place. (*Id.* at 35.)

19 These articles, and the record as a whole, support the conclusion that the "expectant  
20 observation" approach adopted in plaintiff's case is reasonable. There is no evidence in the record  
21 that plaintiff's hernia is growing or that it cannot be reduced. In addition, plaintiff's medical  
22 records do not indicate that he has ever reported suffering intractable pain, nor do they indicate

01 that any medical provider has ever observed any such pain during the course of their evaluations  
02 of plaintiff's condition.<sup>5</sup> Finally, the record reflects that not only has plaintiff been advised of the  
03 criteria for surgery, he has also been repeatedly advised that he must report any changes in his  
04 condition to the medical staff. Thus far, it appears that there have been no significant changes in  
05 plaintiff's condition since it was first diagnosed.

06 The record simply does not support the conclusion that defendants have exhibited  
07 deliberate indifference to plaintiff's medical needs. While plaintiff makes the point that only  
08 surgery can actually *repair* the hernia, he has not established that surgery is the only way to *treat*  
09 a hernia. At most, the controversy presented here amounts to a difference of opinion regarding  
10 the care that plaintiff should be receiving for his hernia. Differing opinions on medical treatment  
11 do not amount to a violation under the Eighth Amendment. See *Sanchez v. Vild*, 891 F.2d 240,  
12 242 (9th Cir. 1989).

#### 13 Medical Malpractice Claim

14 Plaintiff alleges in his complaint that defendants not only violated federal law, but violated  
15 state law as well. The Supreme Court has stated that federal courts should refrain from exercising  
16 their pendent jurisdiction when the federal claims are dismissed before trial. *United Mine Workers*  
17 *v. Gibbs*, 383 U.S. 715, 726 (1966). Because defendants are entitled to summary judgment with  
18 respect to plaintiff's federal constitutional claim, plaintiff's state law claim should be dismissed

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20 <sup>5</sup> The record indicates that plaintiff has reported experiencing some pain in certain  
21 circumstances, but it appears that he has been able to manage the pain by either reducing the  
22 hernia or by limiting his activities. Plaintiff acknowledges that he has not requested medication  
to control pain, but maintains that this is because he has been told that the long term use of pain  
medications would have serious side effects. Notably absent from plaintiff's medical records is  
any indication that he ever discussed pain management options with MCC-TRU medical staff.

01 without prejudice.

02 CONCLUSION

03 For the reasons set forth above, this Court recommends that defendants' motion for  
04 summary judgment be granted and that plaintiff's motion for summary judgment be denied. The  
05 Court further recommends that plaintiff's complaint, and this action, be dismissed with prejudice  
06 as to plaintiff's Eighth Amendment claim and without prejudice as to plaintiff's medical  
07 malpractice claim. A proposed order accompanies this Report and Recommendation.

08 DATED this 5th day of December, 2006.

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10 Mary Alice Theiler  
11 United States Magistrate Judge  
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